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IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN T. JOHNSON,
Plaintiff and Respondent,

vs.

DONALD J. JOHNSON,
Defendant and Appellant.

No.
11110

BRIEF OF RESPONDENT

Appeal from Divorce Decree Rendered by Third Judicial District
Court in and for Salt Lake County, Utah
Honorable D. F. Wilkins, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN T. JOHNSON,
Plaintiff and Respondent,

vs.

DONALD J. JOHNSON,
Defendant and Appellant.

No.
11110

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The Appellant in this case seeks a new trial in order to have the matter re-heard by the District Court with a view toward elimination of the award of the real property interest.

DISPOSITION IN LOWER COURT

There were three hearings held before the same Court concerning this matter. The first was held on

September 21, 1967, the second on October 6, 1967, and the third on November 28, 1967. The Defendant at each hearing was represented by Counsel; however, the Defendant himself did not choose to appear at the first or third hearing.

A proposed property settlement agreement was introduced at the first hearing and signed by the Plaintiff upon her express understanding that Defendant had no real property to divide.

At the second hearing called by Plaintiff because of newly acquired information that Defendant actually had some real property interest at the time of the first hearing, undisclosed even to his own Lawyer (R-59) the stipulation was offered by Defendant. The Court received the Stipulation at that time and permitted the taking of testimony. In this testimony, it was revealed that the Defendant had received a Deed from his parents conveying to him the undivided two-thirds ($2/3$) interest in and to some real property located in the vicinity of 3400 South 9th East, which real property had an evaluation of at least \$26,000.00 (R-66), subject to a life estate in the parents.

In the afternoon of the second hearing, each of the parties was advised that the Court was entering its Decree, substantially in conformity with the settlement agreement with the additional provision that the Defendant be required to convey to the Plaintiff an undivided one-fourth ($1/4$) interest in and to the real property with which he was then vested.

Shortly thereafter, the Defendant cancelled the services of his third attorney and hired a fourth attorney, who now appears of record, (Mr. Quentin L.R. Alston). Mr. Alston then called counsel for Plaintiff and advised him that he had been retained on the case; whereupon, Plaintiff's attorney consented to the withholding of the filing of the Findings of Fact and Conclusions of Law and Decree until the Defendant had had an opportunity to examine them and then present argument in opposition thereto. The parties voluntarily appeared before the Honorable D. Frank Wilkins, on an November 28, 1967; arguments were presented substantially as outlined in Appellant's Brief before the same Court. Not until then were the Findings of Fact, Conclusions of Law, and Decree actually filed.

RELIEF SOUGHT ON APPEAL

The Plaintiff simply seeks to have the decision of the Lower Court affirmed.

STATEMENT OF FACT

Plaintiff filed a Complaint against the Defendant on February 1, 1967. The first Answer was filed by DANSIE, ELLETT, & HAMMILL, on February 8, 1967, and that counsel withdrew on February 27, 1968. Another Answer was filed by ROBERT M. McRAE, on the 6th day of March, 1967, and that coun-

sel withdrew on the 3rd day of August, 1967. Thereafter, until the 11th day of October, 1967, the Defendant was represented by VERNON B. ROMNEY.

The facts upon which the divorce was sought were briefly these:

The Defendant had left his wife and children and had gone home to live with his mother some five (5) years prior to the filing of the divorce. Transcript will show that this was a rather bizzare arrangement; in fact, that the Defendant had moved into his mother's bedroom. There is really no contest whether or not the Plaintiff had grounds for divorce, but simply whether or not the Trial Court would be bound by stipulation of the parties or whether the Court can look to all of the facts to determine what could be decreed as fair and equitable.

ARGUMENT

POINT I. THE TRIAL COURT HAS BROAD DISCRETIONARY POWERS IN DECIDING MATTERS OF DIVORCE AND IS NOT BOUND BY AN AGREEMENT BETWEEN THE PARTIES.

There appears to be no disagreement whatever between the parties with respect to the law in the State of Utah as to discretionary powers of the Court. The law was laid down in Title 30, Chapter 3, Utah Code Annotated, 1953, as amended, and the various

decisions which have followed are completely in line. We refer not only to the Madsen and Callister Cases, cited by the Defendant in his Brief, but also to the more recent decisions of Mathie vs. Mathie, (1961), (363 Pac 2d 799) and to Christensen vs. Christensen, (1967) (422 Pac 2d 534). In both of those cases, citing the earlier cases, the Court has stated that the stipulation between the parties is not binding upon the Court, but should be used merely as a guide. In the Mathie Case the Court further stated that the decision of the Trial Court would not be upset unless there was manifest an abuse of discretion.

**POINT II. THE TRIAL COURT DID NOT
ERR IN ENTERING ITS FINAL DECREE;
ALL THE EVIDENCE WAS BEFORE THE
COURT PRIOR TO ANY FINDINGS, CON-
CLUSIONS OR DECREE.**

Counsel for Respondent has read the Brief of Appellant with great care to determine just what it is that the Appellant is trying to say. The Appellant in his brief cites the legal principles applicable and spends at least three pages in an attempt to get around them.

Without unduly laboring the issues, it should be stated here by way of argument, that the Findings of Fact, the Conclusions of Law, and the Decree as entered were not entered until all hearings and arguments had been concluded. At the hearing held before the Honor-

able D. F. Wilkins on the 6th day of October, 1967, the Defendant himself was present then and was allowed to testify. He was allowed to state his position to-wit, the property which came into his hands came in as his inheritance and, apparently, as a result of some sort of an argument that was going on between himself and his sister. Just what light this can throw upon the matter at hand, we do not know but certainly nothing further could be adduced by subsequent hearing of the case. The Defendant was not present at the first hearing and no stipulation or property settlement agreement was received at that time. As a matter of fact, it was not received until the second hearing, after the Defendant himself was on notice as to what was the purpose of the second hearing—that of determining what additional weight should be given to the newly acquired property interest. At that same hearing, the Court not only took judicial notice of the agreement between the parties, but also heard the evidence with respect to this additional property. The Plaintiff might well argue that she was not given enough of his interest in the property and that she should, in fact, have received at least one-half ($1/2$) thereof. Simply stated, the Trial Court had heard all the evidence and in fact, had heard arguments by the present counsel prior to entering the Decree. We see no means by which more evidence or a rehashing of the old evidence could in any way further enlighten the Court in this matter.

CONCLUSION

The law is clear with respect not only to the power of, but also to the duty of the trial court to enter its Decree in accordance with all the evidence before it. There is also no question but what there was no manifest abuse of discretion. Accordingly, the decision of the Trial Court should be affirmed. In addition, the matter should be remanded to the Trial Court for determination of an award to Plaintiff of a reasonable attorney's fee for the necessary response to this appeal and for costs.

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